Supreme Court, U.S.
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No. 02-1375

In the Supreme Court of the United States

MARK SCHALL, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should review the Colorado Supreme Court's determination that the involuntary draw of Petitioner's blood was supported by probable cause and therefore did not violate Petitioner's rights under the Fourth Amendment to the United States Constitution.

2. Whether this Court should review the legal standard the Colorado Supreme Court applied in determining the involuntary blood draw did not violate Petitioner's rights under the Fourth Amendment to the United States Constitution.

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No. 02-1375

MARK SCHALL, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The People of the State of Colorado (the People) respectfully submit this BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as People v. Schall, 59 P.3d 848 (Colo. 2002). The trial court's ruling granting the Petitioner's Motion to Suppress Evidence is unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on December 16, 2002. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. COLO. REV. STAT 18-3-106(b)(1). (See Appendix A)

3. COLO. REV. STAT. 42-4-1301.1(3). (See Appendix A)

STATEMENT

A. FACTUAL BACKGROUND

On April 2, 2001, at approximately 5:50 a.m., Colorado State Patrol troopers (CSP) were dispatched to an injury accident on Colorado Highway 85 in Douglas County. At 6: 15 a.m. the lead trooper from CSP arrived at the scene and observed a tractor-trailer blocking both lanes of the highway. Another tractor-trailer was turned over on its side in the ditch. The trooper also observed a silver BMW with extensive driver's side damage blocking the southbound lane of the highway. Emergency personnel had responded to the scene before CSP arrived. The driver of the tractor-trailer in the ditch was pronounced dead at the scene. The Petitioner, subsequently identified as the driver of the BMW, was airlifted from the scene in critical condition. The driver of the tractor-trailer still on the highway that collided with the BMW, escaped without any serious injury.

As part of the investigation, a CSP trooper interviewed Robert Thingvold at the scene of the accident. Mr. Thingvold

said that he was driving northbound on highway 85 in his tractor-trailer, while his brother John Thingvold followed in a similar vehicle. Robert Thingvold said he and his brother were trying to avoid hitting a BMW that weaved into the northbound lane while traveling southbound. Robert Thingvold stated that despite his efforts to avoid the BMW he collided with it. He also stated that John Thingvold was able to avoid hitting the BMW, but the evasive actions taken by his brother caused the tractor-trailer to run off the highway and flip over. Investigation at the scene did not reveal any impairment on the part of the Thingvolds. That investigation also revealed that the collision occurred in the northbound lane. Accident reconstruction at the scene also revealed no skidmarks left by the Petitioner. The inexplicable nature of the Petitioner veering into oncoming traffic also suggested to CSP that the Petitioner was intoxicated.

As the investigation at the scene continued, a trooper observed a small wooden box that contained what later tested positive for marijuana sitting on the road in the debris trail that spanned from the point of impact to the point where the BMW came to a stop. The box had an "S" on it, consistent with the Petitioner's name. The trooper then observed several broken beer bottles and one full beer bottle in the back seat of the BMW. At the scene, CSP did not know whether caps were on the bottles. In July of 2002, CSP learned that the caps had been on the bottles. The trooper also observed a heavy odor of an alcoholic beverage coming from the interior of the vehicle. After obtaining all of this information, a trooper advised dispatch to send another trooper to examine the Petitioner.

Troopers arrived at the hospital that was caring for the Petitioner. While at the hospital, CSP obtained two blood draws and a urine sample from the Petitioner, sometime between 7: 30 and 8:00 a.m. that morning. There is no evidence in the

record to suggest that the Petitioner consented to the collection of these samples. On April 5, 2001, the Colorado Department of Health (CDH) analyzed the first blood sample. The analysis indicated a blood alcohol content of .057. CDH re-analyzed that sample on April 19, 2001, with a result of .111. CDH analyzed the second draw on April 10, 2001 with a result of .077. On April 9, 2001, CDH analyzed the urine sample and it tested positive for the presence of alcohol and cannabis. Petitioner was charged with Vehicular Homicide pursuant to C.R.S. 18-3-106(1)(b).

B. PROCEDURAL BACKGROUND

The trial court found that at the time the chemical tests were performed, there was no evidence that the troopers had reason to believe the Petitioner was under the influence or even affected by alcohol. The court accordingly granted the Petitioner's Motion to Suppress Chemical Testing, finding that the tests were performed without a showing of consent or probable cause.

The People initiated an interlocutory appeal of the trial court's ruling on the Petitioner's Motion. This was an interlocutory appeal to the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1 and COLO. REV. STAT. 16-12-102(2). The Colorado Supreme Court held that probable cause existed for the involuntary blood draws. People v. Schall, 59 P.3d 848, 851 (Colo. 2002). Therefore, the blood draws did not violate the Appellee/Petitioner's rights under the Fourth Amendment to the United States Constitution. Id.

In making this determination, the Colorado Supreme Court applied the standard set forth in People v. Sutherland, 683 P.2d 1192, 1194 (Colo. 1984). The Sutherland test enumerates the criteria for determining whether a warrantless, non-consensual

blood draw, taken to test blood alcohol content, comports with the United States Constitution. See id. Under the Sutherland standard:

> (1) there must be probable cause for the arrest of the defendant on an alcohol-related driving offense; (2) there must be a clear indication that the blood sample will provide evidence of the defendant's level of intoxication; (3) exigent circumstances must exist which make it impractical to obtain a search warrant; and (4) the test must be a reasonable one and must be conducted in a reasonable manner.

Id.

Applying the Sutherland test, the court found the key point of contention to be whether probable cause existed to arrest the Petitioner for an alcohol-related driving offense. See Schall, 59 P.2d at 851. Ultimately, the court found that probable cause existed for the blood draw. Id. at 852. In making this determination, the court set out several facts that it used as the basis for its finding. Id. First, the Petitioner caused the accident by driving into oncoming traffic. Id. Second, no skid marks, animal remains or other obstructions were found that would have indicated that the Petitioner drove into oncoming traffic as an evasive measure. Id. Third, officers smelled the odor of an alcoholic beverage emanating from the interior of the vehicle. Id. Last, officers observed several broken and intact beer bottles in the vehicle, but could not immediately determine whether the bottles were opened prior to the accident. Id.

After holding that the requirements of the Sutherland test were satisfied, the Colorado Supreme Court reversed the trial court's ruling and remanded the case back for trial. Id. at 853. The Petition to this Court followed.

REASONS FOR DENYING THE PETITION

The Petition fails to present this Court with any novel questions of law, conflicts between federal or state jurisdictions, or other compelling reasons for this Court to grant review on a writ of certiorari. The Petitioner is requesting this Court to review a determination of whether a blood draw was obtained in violation of the Fourth Amendment to the United States Constitution. This Court has already addressed that same issue. The legal standard applied by the Colorado Supreme Court does not conflict with precedent set by this Court, any federal circuit, or any state court of last resort. Furthermore, the Colorado Supreme Court applied the correct legal standard in determining that the non-consensual blood-draw comported with the requirements of the Fourth Amendment. Petitioner's argument that an incorrect standard was applied is based only on protections created by Colorado's Legislature. That issue is a matter of state concern, thus not properly before this Court.

a) The Questions of Law Presented in this Appeal Have Been Addressed and Settled by this Court.

Petitioner presents questions of law that have already been settled by this court. This Court has previously addressed when a non-consensual blood draw may be obtained. See Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, this Court analyzed four factors to determine when a non-consensual blood sample may be taken in accordance with the Fourth Amendment. Id. First, probable cause must exist to arrest the defendant. Id. at 768-69. Second, there must be a clear indication that the evidence being searched for will be found. Id. at 770. Third, exigent circumstances must exist justifying the failure to obtain a warrant. Id. at 770. Fourth,

the test itself must be reasonable and conducted in a reasonable manner. Id. at 771-72.

The Colorado Supreme Court has adopted the test set out in Schmerber to determine when a non-consensual blood draw may be obtained in accordance with the requirements of the Fourth Amendment. See Sutherland, 683 P.2d at 1194. The Colorado Supreme Court applied the standard announced in Schmerber and adopted in Sutherland in making its determination in the case below. See Schall, 59 P.3d at 851-53. Therefore, the Colorado Supreme Court's decision was based on law already established by this Court.

Because this Court has clearly articulated the criteria needed to obtain a non-consensual blood sample, there is no reason to re-examine that issue. Petitioner fails to present this Court with any novel question of law. Essentially, Petitioner is asking this Court to apply a previously announced, and well accepted, legal standard to a case that fails to present any significant factual distinctions from the myriad of other cases decided under the Schmerber standard.

b) The Colorado Supreme Court's Decision Does Not Conflict With the Current Body of Case Law in Other State or Federal Jurisdictions.

Petitioner asserts that the Colorado Supreme Court's decision conflicts with decisions of other courts in different jurisdictions. However, the Petition fails to present a single case where an actual conflict exists.

First, Petitioner cites People v. White, 492 So.2d 1163, 1164 (Fla. App. 1 Dist. 1986), as a conflicting decision. In White, the District Court of Appeal of Florida, First District held that a non-consensual blood draw was not supported by probable cause where the officer ordering the draw did not smell alcohol

on defendant's breath or know of the specific circumstances causing the accident. Id. at 1164. The officer had not talked to anyone or seen anything leading him to believe that alcohol was involved. Id. A treating paramedic detected the odor of alcohol on defendant's breath, but the officer was not aware of the paramedic's observation when he ordered the blood draw. Id.

The decision in White is not in conflict with the Colorado Supreme Court's decision in Schall. White is a case where the officer had no reason to believe the accident was alcohol-related. In the instant case, the officer was presented with several such indications. The officers were aware that Petitioner caused the accident by driving into oncoming traffic. Schall, 59 P.3d at 852. No skid marks, animal remains, or other obstructions where found that would provide an alternate explanation of why Petitioner was in the wrong lane. Id. The officers also smelled the odor of alcohol emanating from Petitioner's vehicle and saw several broken beer bottles in the vehicle. Id. Although the beer bottles were later determined to have been intact and full at the time of the collision, the extensive damage to Petitioner's vehicle prevented the officers from immediately making that determination. Id.

No conflict exists where two courts reach opposite conclusions based on entirely different facts.

Petitioner also cites State v. Jones, 49 P.3d 273, 281 (Ariz. 2002) as a conflicting case. However, Petitioner only states that that case stands for the proposition that drawing blood is a bodily invasion and therefore a search under the Fourth Amendment that requires probable cause. That same principle was announced in Schmerber. 384 U.S. at 768. Far from being in conflict with Jones, the Colorado Supreme Court's decision embodied that principle by holding that probable cause supported the blood draw. Therefore, Jones is not a conflicting

case, but one which sets out a well-accepted constitutional principle.

Finally, Petitioner cites Schmerber as a conflicting case. However, as stated above, the Colorado Supreme Court applied the standard set out in Schmerber in its analysis in Schall. No conflict can exist where both cases applied the same legal standard and reached the same conclusion in both cases.

Therefore, this Court would not be settling a conflict between different courts by granting the Petition.

c) The Colorado Supreme Court Applied The Correct Legal Standard.

Petitioner argues that the Colorado Supreme Court applied a relaxed standard by only requiring that a non-consensual blood draw be supported by probable cause to believe Petitioner committed an alcohol related driving offense. Petitioner's argument is misguided.

The Colorado Supreme Court applied the standard set out in Sutherland. The Sutherland standard was adopted from this Court's decision in Schmerber. In Schmerber, this Court analyzed four factors and determined that because each of those factors was met, the blood draw was constitutionally obtained. See Schmerber, 384 U.S. at 768-71. In Sutherland, the court adopted each of those factors as a requirement of a four-part test to determine the constitutionality of a non-consensual blood draw. See Sutherland, 683 P.2d at 1194. Petitioner only argues that the first prong of Sutherland test was an erroneous legal standard.

The first prong of the Sutherland, test requires probable cause to believe that the suspect committed an alcohol-related driving offense. See Sutherland, 683 at 1194. This prong was adopted from Schmerber. See Schmerber, 384 U.S. at 768

(finding that officer had probable cause to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor).

Schmerber never expressly required that officers have probable cause to believe the suspect committed an "alcohol-related driving offense" as opposed to any other kind of offense. However, by imposing this limitation, the Colorado Supreme Court has created a further restriction on the types of cases in which a non-consensual blood draw may be obtained. To the extent that the Sutherland standard is different from Schmerber, Sutherland affords greater protections to a defendant.

Petitioner's argument points out the various types of alcohol-related driving offenses in Colorado and notes that only some of those offenses allow a non-consensual blood draw. Essentially Petitioner's argument is that officers must have had probable cause to believe Petitioner committed Vehicular Homicide, not any alcohol-related driving offense, and therefore, the wrong standard was applied. Petitioner's argument is not a proper one for this Court to hear.

Colorado has statutorily restricted the types of offenses in which a non-consensual blood draw may be obtained. COLO. REV. STAT. 42-4-1301.1(3) states in the relevant part:

> No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S...

However, Schmerber did not place any express limitations on the types of offenses in which a non-consensual blood draw may be obtained. See Schmerber, 384 U.S. 757. The Colorado Legislature is free to adopt further restrictions that afford greater protection to suspects. Petitioner's argument focuses on whether a state law requires greater protection than this Court established as a constitutional minimum in Schmerber and Sutherland. That is a question of state law and, therefore, not a proper issue for this Court to decide. See Bell v. Maryland, 378 U.S. 226, 237 (1964) (noting the Supreme Court's tradition of deference to state courts on questions of state law).

CONCLUSION

WHEREFORE, the People respectfully request this Court to DENY the Petition for a Writ of Certiorari.

Respectfully submitted,

5/2/03 BY: _____

Date

WILLIAM W. HOOD, III
Chief Deputy District Attorney

APPENDIX A

1. COLO. REV. STAT 18-3-106(b)(1), Vehicular Homicide: If a person cooperates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.
2. COLO. REV. STAT. 42-4-1301.1(3), Expressed Consent for the taking of blood, breath, urine, or saliva sample – testing:

   Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing. No Law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S., and ther

person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test.